

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Request for
Fair Hearing of:

MEGAN P.,

Claimant,

v.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH No. 2006030593

DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Chico, California on April 14, 2006.

Larry Withers, Case Management Supervisor, represented the Far Northern Regional Center.

Gail P., parent, represented Megan P., who was not present.

The record was closed and the matter was submitted on April 14, 2006.

ISSUES

The issues are:

1. Whether Megan P. is eligible for occupational therapy (OT) services funded by the Regional Center; and

2. Whether OT should be funded and is available through the Butte County Office of Education (OE), or through some other publicly funded source.

FACTUAL FINDINGS

1. Megan P. is a 13-year-old female who is in the eighth grade. She lives in Chico, California with her mother in the family home. Megan's mother is a single parent and Megan's sole support. Megan's birthdate is September 1, 1992. She is a client of the Regional Center with a diagnosis of cerebral palsy (CP) secondary to hydrocephalus, and developmental delay. She takes medication for seizure disorder. She receives special education services from the Butte County OE and currently attends school in a special day class for the severely disabled in Oroville, California. She hopes to transition to high school next year.

2. Megan has undisputed deficits in fine motor coordination and control, motor planning, upper extremity strength, and motor coordination. These deficits cause her some difficulty with self care, including dressing, grooming, bathing and preparing food.

3. Megan received OT services before July 1999 during her attendance at a private school in San Diego through an Individual Education Plan (IEP). She and her family moved to Butte County in 1999. Her family sought and received OT services for Megan through Far Northern Regional Center on a transitional basis. The services were provided by California Children's Services (CCS) at the Chico Medical Therapy Unit.

4. CCS evaluated Megan on July 29, 1999 for OT services. CCS's evaluation concluded that Megan required OT one to two times per week for fine motor skills, development of self-care skills and sensory integration.

5. CCS continued to provide OT services to Megan in accordance with the evaluation through March 2001. The OT services were evidently provided as part of Megan's medical therapy program assembled by her treating physician. The physician determined in March 2001 that OT services should be discontinued because Megan's level of independence and performance limitations were not sufficient to continue to meet the eligibility criteria for medical therapy services, including the OT. Megan's family did not appeal the decision and the discontinuation of the services.

6. Megan began participating in and receiving special education through Butte County OE, and was receiving those services pursuant to an IEP in October 2001. When the OT services funded by the Regional Center and provided by CCS were discontinued, Megan was referred for an evaluation to an Occupational Therapist retained by the Butte County OE. The Occupational Therapist concluded that Megan did not need OT provided by the school because there was no apparent discrepancy between Megan's fine motor and visual motor skills and her cognitive skills. Megan's family did not appeal the determination.

7. Megan was evaluated again in September 2004 by a Registered Occupational Therapist. The evaluation was a follow-up required by Megan's 2003 IEP. The therapist concluded there had been almost no functional gain in Megan's abilities, and that her fine motor and visual skills were still consistent with her cognitive skills. Based on the

evaluation, Megan was found not eligible for OT through the Butte County OE because there was no apparent discrepancy between her fine motor and visual skills and her cognitive abilities.

8. In 2005, Megan's parent requested that the Regional Center fund an updated OT assessment for Megan. The Regional Center denied the request. A Request for Fair Hearing was filed, and the matter was heard before the Honorable Ann Sarli on May 25, 2005. During the Fair Hearing, Megan's parent disclosed that one purpose of seeking the additional assessment was to obtain a "second opinion" to take to the Butte County OE to support her claim with the OE that Megan should receive school based OT as part of her IEP. She also sought an assessment that addressed Megan's non-school based OT needs, such as her ability to use kitchen utensils. She continued to present concerns that Megan's fine motor skills are insufficient to enable her to attain and maintain a reasonable level of self care and to maximize her school program.

9. Megan's individual program plan (IPP) was updated in January 2005. At that time, the IPP did not address Megan's claimed need for OT. The Fair Hearing Decision, dated June 3, 2005, ordered the Regional Center to convene an interdisciplinary team meeting within 45 days of the Decision. The team was ordered to:

"[C]onsider and evaluate claimant's non-educational OT needs and shall prepare a timely IPP. The IPP shall include a provision for referring claimant to a physician for his or her recommendation as to the need for a non-educational OT assessment. The IPP shall include a provision wherein, if an OT assessment is recommended, said assessment is provided through generic sources or the regional center. The IPP shall include a provision wherein, if the assessment recommends OT services, said service is provided through generic sources or the regional center."

10. The Regional Center acknowledged in the earlier evidentiary hearing that OT services were at one time part of Megan's medical therapy services provided to her by the Regional Center as part of her IPP. The OT portion of the medical services were terminated by an unnamed physician on an unidentified date because the "physician determined that claimant did not meet the eligibility criteria for the therapy services *at that time.*" (italics added) Megan's mother did not contest or appeal the termination of the services. There is no evidence that Megan has been evaluated by a physician for her current need for OT services as part of her medical therapy since Judge Sarli's Decision became final, even though the 2005 Decision specifically ordered such an evaluation.

11. The Regional Center did purchase an OT evaluation for Megan by an occupational therapist. The evaluation was performed on January 16, 2006 by Suzanne Creswell, an occupational and physical therapist, of Creswell Physical Therapy and Hand Rehabilitation, Redding, California. Megan was found to have reduced balance responses in both standing and sitting, and inconsistent fine motor grasp with tremoring apparent, requiring visual augmentation. Megan was tested using sensory integration and Praxis test, revealing reduced proprioception, fine motor kinesthesia and tactile processing problems.

She was able to learn to button three ¾ inch buttons. The evaluator noted Megan had particular difficulty with activity involving wrist rotation, such as handling tools or spreading jam on bread. The conclusions of the evaluation were that Megan needs and could benefit from OT services, particularly for assistance with her deficits in fine motor coordination and the various tasks that require such skills. Dressing and using kitchen utensils were particularly mentioned. The opinion was vague regarding Megan's need for and potential benefits for OT assistance as support for her educational program. The opinion was that Megan could benefit from one to two times per month OT services, "either school or community based would help achieve heightened independence in activities of daily living as well as improved access to her eighth grade curriculum." The evaluation did not identify specific educational weaknesses or deficits for which OT services were required for remediation and assistance.

12. Megan's mother presented the evaluation to the Butte County OE and sought again to have OT services added to Megan's IEP. The Butte County OE reviewed Megan's IEP on March 3, 2006. Ms. Cresswell's OT evaluation was reviewed as part of Megan's mother's OT services request. The IEP team denied the request, based in part on Ms. Cresswell's report and in part upon Ms. DeJesus' report dated February 17, 2005. In that report, Ms. DeJesus concluded, following an evaluation, that Megan does not have "direct Occupational Therapy needs from a school-based perspective due to her functioning level, adaptive behaviors in the classroom and ability to participate with peers towards educational goals." Ms. DeJesus' report relied heavily upon reports from Megan's teacher that Megan performs well in the classroom and does not demonstrate any occupational therapy needs that hamper her ability to interact and achieve her educational program. The IEP team also seized upon the failure of Ms. Cresswell to spell out any specific educational benefits, deficits or needs for Megan for which OT therapy would be necessary and responsive.

13. Megan's mother again did not appeal the denial. The Regional Center offered advocacy to assist in an appeal, but the offer was implicitly rejected when she decided not to file an appeal.

14. Ms. Cresswell's recent evaluation does make mention of Megan's need for non-educational OT, for support and assistance in developing independent living skills. Megan's mother testified consistently with her reports to the evaluators noted above, that Megan has difficulty with common household tasks, such as using utensils for cooking and buttoning when dressing, due to her fine motor coordination deficits. The report clearly states there is an existing need for OT support for the development of these home-based independent living skills.

15. Megan's mother renewed her request that the Regional Center provide OT services to Megan based upon the evaluation. At the evidentiary hearing, she was unable to articulate reasons that Megan should have OT services to help her with her educational program, except that her fine motor deficits prevent her from joining in some activities at school. She is concerned that these deficits will be even more excluding next year, when Megan moves on the high school.

16. The Regional Center issued Megan's mother a Notice of Proposed Action shortly after March 3, 2006, denying the request for OT services. The letter set forth the reasons for the action as the Regional Center's belief that the services, if appropriate, were the responsibility of the educational system and the Butte County OE special education program. The Regional Center contended the Regional Center was unable to provide the services because the services were still potentially available through an alternative funding source, the school system, because Megan had a colorable claim that she was entitled to the services from the Butte County OE, but her claim had not been pursued through an appeal.

17. Megan's mother timely filed a Request for a State Level Fair Hearing with the Regional Center. The matter was scheduled for a State Level Fair Hearing before an Administrative Law Judge of the Office of Administrative Hearings. All prehearing jurisdictional requirements have been met, and jurisdiction exists for these proceedings.

18. There was little evidence other than the above presented at the evidentiary hearing. Megan's mother appeared disinclined to file an appeal of the Butte County OE's denial of special education related OT and its refusal to include the service in Megan's IEP. She believes the service would be necessary and helpful for Megan at school, but she has some difficulty articulating why. It is much easier for her to articulate why she feels Megan needs OT for improvement of her independent living skills away from school. She appears to be intimidated by the OE's evaluations, particularly that of Ms. DeJesus, which spells out in considerable detail why Megan is not in need of OT therapy to assist her with her educational program. There is little in the report that identified why OT would or would not be helpful for Megan in her educational program. It appears that at least one strong inference is that Megan appears to be doing well at school, and no specific deficit has been identified that interferes with Megan's educational progress that is the sort of problem that OT could remedy, in whole or in part. The evaluation is difficult for a lay person to read and understand, other than the fact that the school district has not been persuaded that evidence exists that Megan requires OT services to support her educational program. Megan's mother does not see how she can challenge the evaluation and prevail, even with Regional Center advocacy assistance.

19. It does not appear that Megan was evaluated by a physician "for his or her recommendation as to the need for a non-educational OT assessment," as noted in the 2005 decision. The Regional Center either made the referral and did not mention it, or skipped the step and just had Megan evaluated by Ms. Cresswell without the physician's recommendation, as set forth above. The recommendation of the evaluator was that Megan could benefit from OT services twice per month for non-educational purposes. There was no evidence that the Regional Center has complied with the second portion of Judge Sarli's order, requiring an IPP meeting and incorporation of this service for Megan into her plan. The Regional Center has opted to continue to defer to the school district, contending that until Megan's mother fails to prevail on appeal, the school district is required to provide the service, and since the school district is an available provider, the Regional Center, as the provider of last resort, is legally precluded from doing so.

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4659 provides, in pertinent part:

(a) Except as otherwise provided in subdivision (b) or (c), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, Medi-Cal, Medicare, the Civilian and Medical Program for Uniform Services, *school districts*, and federal supplemental security income and the state supplementary program.¹

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

(b) Any revenues collected by a regional center pursuant to this section shall be applied against the cost of services prior to use of regional center funds for those services. This revenue shall not result in a reduction of the regional center's purchase of services budget, except as it relates to federal supplemental security income and the state supplementary program.

(c) This section shall not be construed to impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay.

2. Welfare and Institutions Code sections 4624, 4648, 4651 and 4791 provide the Regional Center with authority and discretion to set its own policies and procedures in order to implement the directives of the Lanterman Act and still enable it to stay within its budget limitations. Pursuant to this authority, the Regional Center has developed and adopted guidelines for how it purchases services called for by consumers' IPPs entitled Purchase of Service Funding and Guidelines (Guidelines). The Guidelines require specificity in all IPPs, directing that each IPP shall contain a schedule of the type and amount of service or support that is to be purchased by the Regional Center or obtained from a generic or other resource.

¹ Italics added.

The OT portion of the Guidelines provides that the Regional Center may purchase OT services for a consumer when the following conditions are met:

- a. The need for the service relates to the presence of a developmental disability or to the prevention of a developmental disability;
- b. The service has been prescribed by a physician, dentist or a podiatrist;
- c. The service is essential to maintaining or improving an individual's functional skills;
- d. A formal evaluation has addressed the specific, time-limiting treatment objectives;
- e. The consumer and/or family care provider has expressed willingness to follow through with the treatment objectives; and
- f. The service is not available through other publicly funded programs.

3. It was not disputed that Megan is an appropriate candidate for OT services, and, following Ms. Cresswell's January 2006 evaluation, that OT services are necessary and appropriate for her, at least in an independent living skills setting. Ms. Cresswell's evaluation was a disappointment, in that it failed to provide any distinction between educational based OT and non-educational OT. It also failed to identify any school specific or educational program tasks that are currently compromised or could be improved by OT services. This lack of distinction makes an appeal of the Butte County OE's IEP team denial of the service exceedingly difficult, as it is undisputed that Ms. Cresswell's evaluation report contains neither a factual basis nor any conclusions that would support finding that the IEP team's denial decision is clearly in error. Megan's mother is left with little ammunition in this report with which to challenge the IEP team's decision, and all the advocacy assistance in the world will not result in producing facts in support of an appeal that are not present in the evaluation.

4. The Regional Center contends that it is legally precluded from providing the services unless there is no other possible provider legally required to provide the OT. The Regional Center further contends that until Megan's mother appeals the school district and fails to prevail, the school district remains an available resource that should provide the services before the Regional Center is required to do so. Were there a few more facts in Ms. Cresswell's report to support such an appeal, the claim would have merit. Ms. Cresswell's report is vague on the ultimate conclusion that the OT could benefit Megan in her educational program, but she does not say how, does not identify any particular deficit or impediment that could or should be assisted with the OT, and fails to provide any facts upon

which her conclusion that OT would benefit Megan in her educational program could be based. Absent a more specific evaluation, in which the evaluator is given much more specific direction regarding the relationship between what OT can provide and how the OT is necessary for Megan's educational program, there is little evidence upon which a successful appeal of the IEP team's denial could be mounted.

5. The Regional Center has done its duty in this case; to determine and exhaust to a reasonable extent, all other available avenues of funding for the service. The Regional Center contention is not unreasonable, and Megan's mother's lack of willingness to challenge the Butte OE denial of OT through the district is a concern. But such a challenge, even with the Regional Center's advocacy assistance, must bear at least a modest chance of prevailing. Megan's mother did take Ms. Cresswell's report to the IEP team meeting and requested the service be added, based on the report. The IEP team found Ms. Cresswell's report lacking in a substantive basis to require the service as a necessary related service to providing Megan a free and fair public education. There is little in Ms. Cresswell's report, save one conclusory and unsupported comment quoted above, that would support Megan's mother's request, and it was not surprisingly denied. There is a fine distinction between requiring consumers to pursue all available avenues of alternative funding for services and requiring them to participate in acts of futility. Without more evidence and support than currently exists in Ms. Cresswell's evaluation, requiring an appeal of the IEP team's denial to then conclude that school district funding for the service is actually unavailable would be such an act of futility. De facto then, all other available avenues of funding for the OT Ms. Cresswell identifies as necessary and useful for Megan have been exhausted. Additionally, Ms. Cresswell's report does make clear a factual basis for her conclusion that home based OT for improvement of independent living skills are necessary and appropriate for Megan.

6. Nothing in this Decision should be construed to prevent the Regional Center from funding an updated or additional OT evaluation that focuses specifically upon Megan's OT needs as those relate to her educational program. Assuming such an evaluation provides some reasonable factual basis for making a claim that the school district fund the OT services, the issue of whether the Regional Center continues to be required to fund the services could be revisited.

ORDER

The claim of Megan P. for Far Northern Regional Center funded occupational therapy services for improvement of independent living skills on a twice monthly basis is GRANTED services is GRANTED. The services shall commence as soon as reasonably practical, but in no event later than 45 days following the effective date of this Decision. The Regional Center shall immediately convene an IPP meeting and add the service to Megan's IPP at a frequency of twice monthly, and in an amount to be determined at the IPP meeting. Notice of Proposed Action, denying Regional Center funding for the service, is DISMISSED.

NOTICE

This is the final administrative Decision. Both parties are bound by this Decision; however, either party may appeal this Decision to a court of competent jurisdiction within 90 days.

DATED: _____

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings